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No. 84-452

In the Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WELDON TODD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court below properly construed the Lacey Act Amendments of 1981, 16 U.S.C. 3371 *et seq.*, and the Airborne Hunting Act, 16 U.S.C. 742j-1, in upholding petitioner's conviction under 18 U.S.C. 371 for conspiracy to violate the Lacey Act, and whether its interpretations of those statutes were so unforeseeable that petitioner's conviction violates due process.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A8-A24) is reported at 735 F.2d 146.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1984. A petition for rehearing was denied on August 3, 1984 (Pet. App. A25). The petition for a writ of certiorari was filed on August 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted under 18 U.S.C. 371 of conspiracy to violate the Lacey Act Amendments of 1981 (Lacey Act), 16 U.S.C. 3372(a)(1), 3373(d)(1)(B). Petitioner was sentenced to one year in prison and ordered to pay a

committed fine of $10,000.[1] The court of appeals unanimously affirmed.

1. The Lacey Act prohibits conduct involving "the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase" wildlife with the knowledge that the wildlife were "taken, possessed, transported, or sold in violation of" another federal law (16 U.S.C. 3373(d)(1)(B)). If the wildlife have a value of over $350, the offense is punishable by a fine of $20,000 and up to five years in prison (*ibid.*). Otherwise, the maximum punishment is a fine of $10,000 and imprisonment for one year (16 U.S.C. 3373(d)(2)).[2]

The other federal statute underlying petitioner's conviction is the Airborne Hunting Act, 16 U.S.C. 742j-1, which prohibits any person "airborne in an aircraft" from shooting any animal for the purpose of capturing or killing the animal. The statute contains an exemption for state and federal employees and persons acting pursuant to certain state or federal permits (16 U.S.C. 742j-1(b)(1)).

2. The evidence adduced at trial showed the following. Petitioner, the owner of a gunshop, arranged airborne hunting trips on which hunters could shoot game from a helicopter. He provided a "package includ[ing] a guaranteed, trophy-size animal, transportation by helicopter, a guide, * * * use of guns provided by [petitioner], and services of a taxidermist" (Pet. App. A9). The fee for this "package" was between one

[1] Petitioner was acquitted of the charge of giving false testimony to a federal grand jury.

[2] These provisions amended the earlier version of the Lacey Act to provide for increased penalties, and became effective on November 16, 1981. They proscribe essentially the same conduct as did the prior version of the statute. Pet. App. A11-A12. Petitioner does not raise any claim in this Court based upon the amendment of the statute (see note 4, *infra*).

thousand dollars and five thousand dollars, depending upon the number and type of game animals involved (*ibid.*).

Several hunters testified concerning petitioner's activities. One hunter stated that in January 1982 he paid petitioner $600 for a trip on which he killed a barbado sheep (Pet. App. A9). Another hunter on that trip testified that he killed an eagle, a mule deer, and a javelina (Pet. App. A9-A10). These animals all were shot by the hunters from a helicopter (1 Tr. 230-231; 2 Tr. 45), and a gun belonging to petitioner was used during the hunt (Pet. App. A10). The government also introduced into evidence a tape recording of an April 1982 conversation in which petitioner approached a third hunter with an offer of an airborne hunt for elk, mule deer, and antelope (*ibid.*).

Finally, there was evidence that in the late summer or fall of 1981, petitioner offered another hunter the chance to participate in an airborne hunt. The hunter testified that petitioner told him that "you could run down the elk * * * get in a helicopter and fly around, spot the animal, either shoot it with a shotgun out of the helicopter or just run it down and cut its throat, whatever we needed to do" (1 Tr. 150). Petitioner testified that he knew that it was unlawful to shoot animals from a helicopter in flight (2 Tr. 180).

3. After the jury returned its verdict, petitioner moved for acquittal notwithstanding the verdict. He claimed that the conviction was improper because the starting date of the conspiracy alleged in the indictment was prior to the effective date of the 1981 amendments to the Lacey Act (Motion for Judgment of Acquittal Notwithstanding the Verdict 1). See note 2, *supra*. In addition, he asserted that there was not sufficient evidence to support his conviction (Motion for Judgment of Acquittal Notwithstanding the Verdict 1). The trial judge denied the motion and entered the conviction, and petitioner appealed.

4. The court of appeals affirmed. It rejected petitioner's claim that his conspiracy conviction violated the Ex Post Facto Clause of the Constitution (Art. I, § 9, Cl. 3) because the conspiracy was alleged to have started prior to the effective date of the 1981 Lacey Act Amendments. Petitioner argued that the jury instructions improperly permitted the jury to consider evidence of events occurring prior to the effective date of the amendments (Pet. App. A14.) The court of appeals noted that "[m]ost of the evidence focused on events that occurred" after the amendments' effective date (Pet. App. A15-A16). The court further observed that the ex post facto prohibition is not implicated when a statute imposing a greater penalty for a conspiracy becomes effective while the crime is ongoing (Pet. App. A17). Here, the court found, the conspiracy "clearly continued past the effective date of the [Lacey Act Amendments]" (*ibid.*).

In his reply brief in the court of appeals (Reply Br. 3-4), petitioner asserted for the first time that the Lacey Act applied only to transactions in wildlife that had been killed or captured. Therefore, petitioner asserted, there could be "no crime in offering" to provide hunts involving the future acquisition of wildlife (*ibid.*). The court of appeals did not directly address this contention, but it did hold that to establish a conspiracy the government was required to prove only one overt act, not the entire offense, and that "[a] commercial arrangement whereby a professional guide offers his services to obtain wildlife illegally is an offer to sell wildlife" and thus forbidden by the Act (Pet. App. A21).

In his rehearing petition in the court of appeals, petitioner for the first time argued that the possession by the helicopter pilot of a state permit to hunt coyotes from the air authorized the pilot to engage in the airborne hunting of any animal (Pet. for

Reh'g 4).[3] Petitioner concluded that any agreement he might have made with the pilot "to take *any* animals from the air [therefore] would not be illegal or a conspiracy to violate the law" (*ibid.* (emphasis in original)). To the extent that the court of appeals' affirmance of the conspiracy conviction reflected a contrary interpretation of the Airborne Hunting Act's exemption for permit holders, petitioner asserted that the construction was unforeseeable, and that no "reasonably intelligent person had fair notice of this construction" (Pet. for Reh'g 5). The court of appeals denied the rehearing petition without opinion.

ARGUMENT

Petitioner contends in this Court that the court below erred in rejecting the arguments concerning the interpretation of the Lacey Act and the Airborne Hunting Act that he first raised in the court of appeals in his reply brief and petition for rehearing, respectively.[4] The

[3] Petitioner claims that he raised this argument in the district court as "an insufficient evidence point" (Pet. 10 n.1). However, in the district court he contended that the government was required to prove that the pilot had no permit (Memo in Support for Judgment of Acquittal 2-3). He did not argue that the coyote permit authorized the airborne hunting of all animals.

[4] Petitioner's claim (Pet. 17-25) that the court of appeals erred by applying the "plain error" rule apparently is directed at the court's rejection of his statutory construction arguments (see Pet. 21-23). However, the court of appeals did not apply the plain error rule to those arguments. It stated that a conspiracy to violate the Lacey Act could be established from an offer to obtain wildlife illegally (Pet. App. A21-A22). The court did not explicitly address the argument raised in the petition for rehearing concerning the Airborne Hunting Act because it simply denied the petition for rehearing.

The court of appeals did apply the plain error rule to petitioner's argument relating to the 1981 amendments to the Lacey Act (Pet. App. A11-A17), but it went on to reject his argument on the merits (Pet. App. A17). Moreover, petitioner does not seek review of the court of appeals' decision regarding this claim. Therefore, this case does not present any issue concerning the court of appeals' application of the plain error rule.

unanimous decision of the court below is correct, and does not conflict with any decision of this Court or of any other court of appeals. Therefore, further review by this Court is not warranted.

1. Petitioner contends (Pet. 5, 8-9) that his offers to arrange future hunts on which wildlife would be shot from a helicopter cannot qualify as overt acts in furtherance of a conspiracy to violate the Lacey Act because the Act applies only to the sale, transportation, or purchase of wildlife that have been "taken." Since the wildlife that would be the targets of these future hunts were not yet "taken"—defined by the statute as "captured, killed, or collected" (16 U.S.C. 3371(i))— petitioner asserts that he did not conspire to violate the statute.

a. Petitioner's argument is at odds with the statutory language, the obvious objective of the law, and explicit legislative history. First the statute itself prohibits any "attempt to commit any act described in" the statute (16 U.S.C. 3372(a)(5)). This language could refer only to situations in which the acts prohibited by the statute have not been fully accomplished, such as where wildlife have not been captured or killed. Second, petitioner's theory defies common sense. Since, in his view, the Lacey Act would not be violated until the actual killing of wildlife had occurred, the government, though aware of planned illegal hunts, could take no action until the hunts actually took place. In sum, petitioner argues that a wildlife protection statute should be interpreted to require the killing of wildlife as a condition precedent to government intervention.

That Congress did not intend such a result is clear from the legislative history. The Senate report states that "a commercial arrangement whereby a professional guide offers his services to illegally obtain wildlife is, in effect, an offer to sell wildlife. When such an offer is made with the requisite knowledge of the illegal nature

of the act, [the statute] will apply." S. Rep. 97-123, 97th Cong., 1st Sess. 12 (1981). Thus, Congress specifically intended that the statute apply to offers of future hunts such as those made by petitioner in this case.

b. Petitioner appears to claim (Pet. 14-15) that even if his interpretation of the statute is not correct, the proper interpretation was so unforeseeable that his conviction constitutes a violation of due process under this Court's decision in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). In *Bouie*, a state trespass statute that prohibited entry upon posted premises was interpreted by the state court to proscribe in addition "the different act of remaining on [unposted] * * * premises after being asked to leave" (378 U.S. at 355). This Court held that a criminal conviction under the judicially-expanded statute could not stand because "[t]he basic principle that a criminal statute must give fair warning of the conduct that it makes a crime" barred a criminal conviction resting on an "unforeseeable" judicial construction of a statute (378 U.S. at 350, 352).

Bouie does not apply in this case because the proper construction of the Lacey Act was not unforeseeable. The plain language of the statute and explicit legislative history gave clear notice that the acts engaged in by petitioner were subject to criminal penalties. Thus, even if the court of appeals' decision added a "clarifying gloss" to the statute, there is no basis for finding a due process violation (*Hamling* v. *United States*, 418 U.S. 87, 115-116 (1974)).

2. Petitioner's claim based upon the Airborne Hunting Act is similarly meritless. The statute states that its prohibitions "shall not apply to any person * * * operating under a license or permit of, any State or the United States to administer or protect or aid in the administration or protection of land, water, wildlife, livestock, domesticated animals, human life, or crops" (16 U.S.C. 742j-1(b)). Petitioner asserts (Pet. 10-12) that

his co-defendant, the helicopter pilot, had a state permit to shoot coyotes from the air, and that the pilot therefore was free to engage in the airborne hunting of any animal.

a. This interpretation severely strains the statute's plain language as well as common sense. If a permit authorizes the killing of one type of animal, shooting other animals plainly cannot constitute operating "under" the permit. Moreover, the statute requires that a permit holder report to the issuing authority the number and types of animals that he has taken (*ibid.*). The states also are required to file with the federal government an annual report including "a description of the animals authorized to be taken [under each permit]" and the animals taken by each permit holder (16 U.S.C. 742j-1(b)(2)). These reporting requirements indicate that the exemption is limited to the terms of the permit.

Congress created the exception for permit holders in order to avoid any prohibition on airborne hunting necessary for specific purposes, such as the protection of animals and crops. See S. Rep. 92-421, 92d Cong., 1st Sess. 4 (1971) (exemption applies to person "carrying out his duties" to protect or administer land, livestock, wildlife, or crops). Petitioner's argument, which is not supported by any authority, would allow a permit holder to engage in conduct completely unrelated to the purpose of the permit. There is no justification for construing the statute to give such permit holders an authorization to engage in unlimited airborne hunting.

b. Petitioner again asserts (Pet. 12-16) that a contrary interpretation of the statute is so unexpected that, if applied to him, it would violate his due process rights. For the reasons stated above (see page 7, *supra*), this argument should be rejected. The interpretation is supported by the very language of the statute,

as well as by its purpose and legislative history. Petitioner's claim that such an interpretation was unforeseeable is frivolous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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